

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

WILMINGTON SAVINGS FUND :  
SOCIETY, FSB, : C.A. No. K12C-12-011 WLW  
:  
Plaintiff, :  
:  
v. :  
:  
BROWN SHIELS & O'BRIEN LLC :  
H. CUBBAGE BROWN, JR. AS :  
GUARANTOR and JOHN E. :  
O'BRIEN AS GUARANTOR, :  
:  
Defendant. :

Submitted: May 3, 2013  
Decided: August 15, 2013

**ORDER**

Upon Plaintiff's Motion for Summary Judgment.  
*Granted.*

Garvan F. McDaniel, Esquire of Bifferato Gentilotti LLC, Wilmington, Delaware;  
attorney for the Plaintiff.

H. Cubbage Brown, Jr., Esquire of Brown Shiels & Beauregard, LLC, Dover,  
Delaware.

John E. O'Brien, *pro se*

WITHAM, R.J.

### ***I. Introduction***

Before the Court is a Motion for Summary Judgment filed by the plaintiff, Wilmington Savings Fund Society, FSB (“Plaintiff”), in this action seeking judgment on a promissory note executed by Brown, Shiels & O’Brien, LLC (“BSO”), and Cubbage Brown Jr. (“Brown”) and John E. O’Brien (“O’Brien”) as guarantors.<sup>1</sup> Plaintiff argues that it is entitled to summary judgment against Defendant John E. O’Brien because his answer to Plaintiff’s Complaint failed to meet the requirements of 10 *Del. C.* § 3901(a). For the foregoing reasons, Plaintiff’s Motion for Partial Summary Judgment is granted.

### ***II. Factual and Procedural Background***

On January 27, 2008, BSO executed and delivered to WSFS a promissory note in the amount of \$50,000 (“the Note”). O’Brien and Brown executed commercial guarantees securing the Note. WSFS perfected its security interest in the collateral by filing a UCC-1 financing statement with the Delaware Secretary of State on January 30, 2006.

Defendants later defaulted on the Note. On October 30, 2012, WSFS sent a demand letter to each of the defendants demanding payment of the Note in full.<sup>2</sup>

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<sup>1</sup> Although Plaintiff’s Motion is titled “Motion for Summary Judgment of Plaintiff Wilmington Savings Fund Society, FSB,” it seeks relief only with respect to the issue of O’Brien’s liability as a guarantor of the note. Thus, the Court treats Plaintiff’s motion as one seeking partial default judgment, as O’Brien’s answer failed to meet the requirements of 10 *Del. C.* § 3901(a).

<sup>2</sup> The balance of the Note totaled \$49,042.31, which included \$48,414.85 in principal, \$436.40 in interest, and \$191.06 in late fees.

***WSFS v. Brown Shiels & O'Brien, et al.***

C.A. No. K12C-12-011

August 15, 2013

Having received no response, Plaintiff filed this action requesting judgment against Defendants in the amount of \$49,042.31, plus attorney's fees and costs. In accordance with the provisions of 10 *Del. C.* § 3901(a), Plaintiff's complaint expressly stated that Defendants must answer the allegations therein by an affidavit of defense. WSFS attached to the Complaint, as exhibits A and E, respectively, copies of the Note and the aforementioned demand letter.

The summons and a copy of the complaint were served on O'Brien on December 18, 2012, and notice of service was entered on the docket on December 24, 2012. On January 18, 2013, O'Brien filed an answer to the complaint. An affidavit of defense was not filed with O'Brien's answer, in contravention of § 3901(a). Plaintiff thereafter filed the instant motion, which essentially seeks the entry of partial judgment by default.

### ***III. Discussion***

The courts of Delaware have been consistent in giving strict interpretation to the requirements of the statute permitting judgments on affidavit of demand.<sup>3</sup> The relevant statute is 10 *Del. C.* § 3901(a), which provides that "in all actions upon ... notes ... the plaintiff may specifically require the defendant or defendants to answer any and all allegations of the complaint by an affidavit setting forth the specific nature and character of any defense and the factual basis thereof." Subsection (b) of § 3901 elaborates upon the defense affidavit requirements as follows:

(b) if the defense is to a part only of the cause of action, the defendant, or if

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<sup>3</sup> *Lamson v. Habbart*, 43 A.2d 249, 250 (Del. 1945).

*WSFS v. Brown Shiels & O'Brien, et al.*

C.A. No. K12C-12-011

August 15, 2013

there be more than 1, any 1 or more of them, shall in such affidavit, specify the sum which the defendant or they admits to be due ....

A defendant need not file an affidavit to answer any allegation unless the plaintiff files with the complaint a copy of the instrument of writing.<sup>4</sup> Assuming this requirement is met, and a plaintiff makes such a demand for an affidavit but the defendant does not comply, the plaintiff may be entitled to a default judgment.<sup>5</sup>

In the instant case, Plaintiff's Complaint specifically required Defendants to respond to the complaint with an affidavit of defense. O'Brien argues that Plaintiff is not entitled to default judgment because it did not file an affidavit of demand with its complaint. However, O'Brien appears to rely upon an older version of § 3901, which required the plaintiff to file an affidavit of demand stating "the sum demanded" along with the instrument sued on.<sup>6</sup> The present version of § 3901 omits the requirement for an affidavit of demand and merely requires that a plaintiff file a copy of the promissory note with the complaint.

Plaintiff has met the requirements of § 3901. The complaint alleges that defendants executed the promissory notes and guarantee agreements, that defendants failed to repay the obligation as required, that notice of default and demand for payment was given, and that defendants owe \$49,042.31, plus attorney's fees and

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<sup>4</sup> 10 *Del. C.* § 3901(c).

<sup>5</sup> 10 *Del. C.* § 3901(d).

<sup>6</sup> See *Elmwood Fed. Sav. Bank v. Forest Manor Estates*, 621 A.2d 354 (1992) (noting that the General Assembly eliminated this requirement when it amended § 3901 in 1985).

*WSFS v. Brown Shiels & O'Brien, et al.*

C.A. No. K12C-12-011

August 15, 2013

costs. Plaintiff attached a copy of both the promissory note and the guarantee agreements to the complaint. O'Brien did not respond to the complaint by affidavit nor did he set forth a specific defense to the complaint with supporting facts. The Court recognizes that O'Brien, in an attempt to cure the deficiencies in his answer, has since filed a Motion to Amend. Attached to the Motion to Amend is an Affidavit of Defense. O'Brien did not seek leave to amend his answer pursuant to Superior Court Civil Rule 15(a). Therefore, his Motion to Amend is hereby denied. Accordingly, O'Brien is deemed legally to have admitted the allegations of the complaint and is subject to a default judgment pursuant to 10 *Del. C.* § 3901(d).

**CONCLUSION**

For the foregoing reasons, Plaintiff's Motion is **GRANTED**. IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
Resident Judge

WLW/dmh